SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 235

IN THE MATTER

—of—

HYGRADE ENVELOPE CORP.,

Bankrupt.

GIBRALTAR FACTORS CORPORATION,

Petitioner,

—against—

SAMUEL S. BARANOW, Trustee in Bankruptcy of HYGRADE ENVELOPE CORP.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petition adequately sets forth the statement of the first opinion of the Court of Appeals and of the District Judge and the fact that the second opinion of the Court of Appeals has not yet been reported, and the jurisdictional requirements.

Questions Presented

1) Are the matters presented by the petition for certiorari of sufficient public importance to warrant consideration by the U. S. Supreme Court?

2) Does a life insurance policy procured by a corporation on the life of its executive, owned by the corporation, with the corporation as the beneficiary, enjoy exemption under the New York State Insurance Law?

3) If the life insurance policy enjoys exemption under the New York State Insurance Law does it qualify for exemption under the Bankruptcy Act?

4) If the assignment of the life insurance policy was preferential does the Trustee have the right to recover the proceeds, or is the Trustee's recovery limited to the cash surrender value of the policy at the time of the assignment thereof?

Argument

The case does not hold sufficient public importance to warrant consideration thereof by this court.

The questions posed by petitioner could reach a court only if, as here, all of the following events occurred:

a) Assignment of a life insurance policy by a corporation to a creditor

b) Death of the insured within four months of the assignment

c) Fling of a petition in bankruptcy by or against the corporation within four months after the assignment.

Such a course of events occurs so rarely that, whatever the determination of the case, it cannot have any significant impact on the public interest.

Questions 1 and 2 presented by petitioner do not belong in the case. As stated in the Court of Appeals decision, the questions were whether the assignment had the effect of enabling the assignee to obtain a greater percentage of his debt than some other creditor of the same class (71a).

Question 4 presented by petitioner was decided in petitioner's favor (70a), and is not subject to review on application by petitioner.

Question 5 presented by petitioner was decided by the Referee in bankruptcy in his decision of September 30, 1965 (10a). The Court of Appeals, by reversing the Referee's dismissal of the Trustee's counterclaim in the decision of July 13, 1966, in effect affirmed the Referee's finding of insolvency. No review of that decision of July 13, 1966 was sought by petitioner, and it is now too late to do so.

Section 166 of the New York State Insurance Law accords exemption in specified instances to "any person". Petitioner obviously relies on Section 37 of the General Construction Law which states that the term "person" includes a corporation. Section 110 of the same statute reads as follows:

> "This chapter is applicable to every statute unless its general object, or the context of the language construed or other provisions of law indicate a different meaning was intended from that required to be given by this chapter."

It is obvious that the legislature did not by the exemption provision, intend to empower a corporation to keep a policy owned by the corporation with itself as the beneficiary, from its creditors.

By italicizing the third sentence of Section 166 of the New York State Insurance Law petitioner indicates its reliance on that sentence to support the claim of exemption.

The fifth sentence of Section 166 throws light on the application of the third sentence by referring to "the person effecting the insurance under the third sentence thereof, or the executor or administrator of any such person." Obviously, this cannot refer to a corporation.

As to the amount of recovery by the trustee, petitioner refuses to recognize the fact, as stated in the Court of Appeals decision (73a), that the measure of recovery is limited to the value of the transferred items only if it has been converted.

The meaning of the word "converted" is clarified by the House Report on the Bill adopting the 1938 Amendment of Section 60b of the Bankruptcy Act.

That Report is as follows:

> "House Report No. 1409 on H. R. 8046, 75th Congress 1st Sess. 1937, pages 30-31
>
> "b Recovery of Preferences:
>
> Section 60b. The language of the present law is indirect and confusing and unsatisfactory. Sub-division 60b has been recast by deleting the repetition of the definition and of the test. It has been made clear that

a transfer as defined in subdivision (a) is voidable if the creditor who receives it has reasonable cause to believe, at the time when the transfer was made, or is deemed to have been made, was insolvent. The provision in regard to the recovery of the property or its value from the preferred creditor has been built up. Under the existing language a Trustee is permitted to elect whether to take the property or its value. This is not sound or equitable. *The estate should be entitled to a restitution of the property itself, if available.* (Emphasis ours.) Therefore, it has been provided that the Trustee may recover the property, but if it has not been converted by the transferee, the bona-fide purchaser from, or lienor of the transferee is protected to the extent only of the actual consideration paid * * * ."

Collier on Bankruptcy in Volume 3 thereof, page 1103 presents the following interpretation of the meaning of Section 60b.

" * * * Where the property preferentially transferred has been converted, a problem arises as to the amount of damages recoverable. *It has been held that where the transferee sold the property and received as much or more than the Trustee could have realized from a sale of the same property the Trustee may not recover an amount in excess of the proceeds of the sale.* (Emphasis ours.) Further, where the transferee in selling the property incurred reasonable expenses and has realized as much money as the Trustee could have, he is chargeable only for the net proceeds of the sale. On the other hand, a creditor who has disposed of the

assets at sacrifice prices which were not justified under the circumstances could be surcharged therefor."

The question in the instant case is whether the property transferred has been "converted" as that term "converted" is used in Section 60b of the Bankruptcy Act or whether the term "converted" as used by Congress was not intended to apply to a situation such as here presented.

There is no case that can be found that furnishes a precise precedent for the Court in the instant case.

The comments in the House Report and in Collier both indicate that the change in Section 60b was designed to relieve a preferee of the unfair obligation to buy the subject of the preference. In the instant case there was no conversion of the assigned policy of Gibraltar. The policy simply matured and Gibraltar received the proceeds thereof when the policy matured and is accountable for those proceeds.

Even if under State Law the policy had been exempt it could not enjoy exemption in a Bankruptcy proceeding since §6 of the Bankruptcy Act directs allowance to bankrupts of exemptions prescribed by the laws of the United States. This bankrupt was not accorded exemption by the State Law and for the reasons stated in the Court of Appeals decision (69a), the policy was not entitled to exemption in the hands of the assignee thereof.

Conclusion

The questions involved lack public importance and the arguments of petitioners in support of its application lack merit, and the petition for certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent